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«CRIMINAL LAW SOURCEBOOK»*

par Ali ADNAN AL-FEEL**

Criminal Law is a species of political and moral philosophy. Its central question is justifying the use of the state's coercive power against free and autonomous persons. The link with moral philosophy derives from one answer to the problem of justifying the use of state power. If the rationale or a limiting condition of criminal punishment is personal desert, then legal theory invariably interweaves with philosophical claims about wrongdoing, culpability, justifying circumstances and excuses.

Criminal Law Sourcebook presents cases and materials illustrating the statutory and judicial practices of criminal law in the common law states of Australia.

The authors of this book on Criminal Law Sourcebook lead the reader on an interesting and useful journey through the terrain of research design, they strike just the right balance between theory and practice, detail and generality.

Criminal Law Sourcebook is a thoughtful, well written and comparative study on the common law jurisdictions (New South Wales, Victoria, South Australia and the Australian Capital territory) and the Code Jurisdictions (Queensland, Western Australia, Tasmania, and the Northern territory).

It is nice to see the emergence of more works such as Criminal Law Sourcebook that use comparative analysis to examine developments in the related Australian criminal laws.

The authors in their introduction do a good job of setting the scene and justifying the selection of topics. Their intention is to transcend the existential discontinuities that exist between the states and territories in Australia. Moreover, the parliaments in each of the states and territories have transformed the form and content of discrete areas of the substantive criminal law. Similarly, the judicial interpretations of criminal statutes and the common law of crime

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*. P. Rush et S. Yeo, *Criminal Law Sourcebook*, Sydney, Butterworths, 2000.

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have expatiated extensively on the abstract and conceptual architecture of general principles of criminal responsibility and the institutional policies of due administration and justice.

It is always difficult to do justice in a limited number of words to an edited collection with a large number of chapters. In this book, there are 12 chapters. Each chapter is introduced by a brief overview of the topic and the central issue. These chapters are all well rooted in empirical research. The context for the chapters in Criminal Law Sourcebook is Australian and its orientation is theoretical, practical and descriptive. This means that the book can contribute to theoretical and practical debates worldwide.

Substantive criminal law is a global phenomenon and the themes and issues elaborated on in this book are equally relevant for North America, Europe and elsewhere. It is important to comment on the quality of this work as a comparative analysis. Today there is a dearth of comparative legal analysis that addresses statutory and judicial trends in Australia . For that effort, Rush's and Yeo's work deserve applause. This book is a noteworthy contribution to the field of Australian criminal law. As we said, this book consists of 12 chapters.

The first chapter is jurisdiction and general principles. In the first section of this chapter, the authors speak of the general principles of criminal responsibility because the interpretation of these principles provides one dominant way of constructing the meaning or value of current criminal law. The authors note the prevalence of these principles in the cases and their effects on how the Australian Jurisdiction of criminal law can be understood. In the final section of this chapter, the authors draw their attention to a number of cases that have challenged (in Anglo-Australian courts) the reception of the common law of crime, and the judgments in these cases provide studies of the jurisdiction of criminal law in Australia .

The second chapter focuses on the laws of theft and larceny. This chapter is concerned with understanding the basic crimes against property namely, theft and / or larceny. In the first section of this chapter, the authors begin with the social and legal history of the law of property crime and the cases in this chapter, repeatedly return to this social and legal history for their

understanding of the current law of theft and / or larceny. In the final section of this chapter, there are questions and responses to them as following :

1. when does the act of taking property amount to an appropriation (or what, in the law of larceny, is called an asportation)?
2. what is the test of dishonesty that must be used when deciding whether a particular appropriation is dishonest ? Related to this issue is the question of who is responsible for the decision of dishonesty __ the jury or the judge?
3. what is the scope or meaning of «property belonging to another»?
4. what are the difficulties of proving the requirement that the accused possess an «intention to permanently deprive» that property?

The third chapter examines deceptive and other crimes against property. In this chapter the authors concerned with the basic offences of obtaining by deception and obtaining by false pretences, as well as a number of aggravated property crimes. Section one of this chapter extracts leading judgments on the acquisition of property by a deceptive practice. In section two and three of this chapter, the authors consider the legal elaboration of the crimes of robbery and burglary.

In the fourth chapter the authors address the laws of assault. In the legal construction of the central crimes of assault elaborated throughout this chapter, a number of specific issues of definition and application are addressed. These issues arise in each Australian jurisdiction. In respect of each legal type of assault, they are :

1. the level and type of behaviour that falls within the *actus reus;*
2. the required standard of mentality and its meaning;
3. the doctrine of temporal coincidence that links the *actus reus* to the *mens rea;*
4. the availability of the «defence» of consent in the law of assault.

In the fifth chapter, the authors are concerned with the legal construction of two core sexual offences, rape and indecent assault. The are also concerned with the formulation of the legal doctrines and what these doctrines implicitly and explicitly say about the links between law and sexual relations. In the first

section, the readings address the different levels at which the law of rape/sexual assault is created and applied. The second section of this chapter addresses the laws of indecency in the crime of indecent assault. Indecent assault factual distinction from rape is that the law targets sexual acts where penetration does not take place. Throughout the readings in this chapter, there is the more fundamental theme of the law of sexual offences : namely, what does criminal law regard as a sexual relation and how does criminal law imagine sexual relations? It is these questions that establish the threshold beyond which criminal law transforms sexual relations into licit and illicit forms of sexual assault.

The sixth chapter addresses the conduct of homicide and it is concerned with the legal formulation of the crimes of murder and manslaughter. The *actus reus* of murder and manslaughter is dealt with by the readings in this chapter. The readings in this chapter return once again to the enterprise of general principles of criminal responsibility.

At the level of the *actus reus*, the two general principles of criminal responsibility are voluntariness and causation. The first section deals with the voluntary action of the accused. In this chapter, the readings from the judgments in Ryan and Falconer spell out the specific legal meaning of voluntariness. The second section considers the general principle of causation in criminal law. The final section addresses the specific legal problem known as «omissions». This chapter is concerned with the general principles of voluntariness and causation in criminal law and the specific legal problems that arise when applying those general principles to particular factual situations where death has occurred and the accused is prosecuted with murder or manslaughter.

Chapter seven presents the kinds of homicide. The readings in the present chapter addresses the processes through which the various *mens rea* of homicide are formulated in current Australian criminal law. The first section addresses the rhetoric of legal psychology dealing with judgments in Hancock, Shankland, Pemble, Crabbe and Royall. The required *mens rea* of murder is at least recklessness and definite intention as to consequences of an action. The second section addresses the meaning of the requirement that the intention or recklessness of the accused coincide in time with the actions of the accused

causing death. This is called the doctrine of temporal coincidence and the case of Meyers illustrates the demand that the prosecution closely adheres to the doctrine. The remaining sections are concerned with crimes of homicide which involve what are traditionally regarded as departures from the common law tradition of *mens rea*. In the law of manslaughter and of constructive murder, a person will have voluntarily acted in such a manner as to cause death and yet did not intend, nor was reckless as to, causing death or grievous bodily harm. In such situations, criminal law builds another *mens rea* to take the place of the subjective standard that law cannot see in the facts. There are several methods that criminal law uses in going about this task of constructing the substitute *mens rea* of homicide. The third section provides readings on the law of constructive murder, or what the common law calls felony murder. In section four, the readings address two legal types of manslaughter.

Chapter eight considers doctrines of provocation and self-defence. The readings in this chapter turn to the doctrinal formulation and definition of the substantive defences. The first section provides the leading and authoritative cases on provocation, which are relevant to an understanding of the defence in all Australian jurisdictions. The statutory definitions largely embody the common law approach. Alternatively, the High court has attempted to bring the common law position into line with the statutory approach. The second section deals with the doctrine of self-defence and provides the leading cases for New South Wales, Victoria and the Australian Capital territory. In South Australia, there is a recently enacted statutory definition, which at least arguably is being judicially interpreted in the same way as the common law approach. Unlike the other jurisdictions, South Australia also has the partial defence of excessive self-defence. The third section of this chapter organizes the readings and cases in terms of the substantive social issues to which the courts have been responding when formulating the legal definitions of provocation and self-defence.

Chapter nine focuses on the legal formulation and elaboration of the doctrine of duress and the doctrine of necessity. Section one deals with the doctrine of duress. The starting point of the appellate consideration of the doctrine of duress is whether, on the evidence before the trial court and in the current state of the law, the defence should be put to the jury for its decision. The answer to this question provides the substantive law of duress. One way of

answering it is to assess and elaborate the proper directions to and summing-up for the jury on the defence. This approach completely dominates the judgment in Abusafiah. By contrast, the cases of Lawrence and Howe formulate the doctrine of duress by expatiating upon the authority, principles and policies of the common law. Section two studies the doctrine of necessity. The question that has dogged the courts is whether criminal law recognises such a defence.

In the tenth chapter, the authors have collected readings that address situations in which the accused relies on a claim that his or her psychological processes were in some way disrupted at the time of committing the crime charged. Section one deals with the defence of insanity and the defence of diminished responsibility. The doctrine and defence of diminished responsibility is closely allied with the defence of insanity. Whereas the doctrine of insanity speaks of «defect of reason» and its cognate expressions, the doctrine of diminished responsibility speaks of «abnormalities of mind». Section two focuses on the doctrine of intoxication. The primary concern is «self-induced intoxication» namely, intoxication that is the result of choosing to consume alcohol or drugs (licit or illicit). Section three considers the doctrine of automatism. Automatism and insanity are related defences and, in some trials, their interaction is crucial to the legal dispute. The final section of this chapter addresses the doctrine of mistake.

Although it is a discrete doctrine of criminal law, it cannot be understood apart from its formulation in the doctrine of strict and absolute liability. The general principles of criminal responsibility have been fundamentally created and formulated by the common law tradition. In common law, the presumption was that all crimes require proof of *mens rea*. With the rise of statutes and statutory crimes in the nineteenth century, the issue became how to interpret crimes that did not exist in common law but were created by statute : did the common law presumption of *mens rea* apply and, if so, how did it apply to the specific statutory section? The answer to this question is the doctrine of strict and absolute liability.

The authors collect leading cases on the legal discourse of complicity, the legal concern is to target the formation of and participation in collectives or groups – and to attribute criminal liability to individuals for their personal

participation in the group's criminal activities. The doctrine of complicity is an example of the concern of criminal legal practice to widen the net of criminal liability to cover people on the fringe, as it were, of personally committing crimes. The doctrines of complicity do not create and define a substantive crime called complicity, rather, the doctrines create no more and no less than a legal method for finding criminal liability. Section one begins with an overview of the doctrine of complicity and its various prosecutorial methods.

Chapter eleven offers doctrines of complicity. Complicity is not a crime but a method of finding criminal liability in the specific factual situations of particular cases. The doctrines of complicity construct two such methods. Section two addresses the first method, which constructs complicitous liability by reference to the common law classifications of principles and accessories. This method is primarily concerned with the forms of «secondary participation». The term «secondary participation» is increasingly used in Australia as the generic phrase describing what the common law calls «aiding, abetting, counseling or procuring» the commission of a crime. This method is applicable in all the common law jurisdictions of Australia . The final section addresses the second prosecutorial method of complicity. That method of constructing complicitous liability is by reference to the more specific doctrine of common purpose (in Victoria, it is also referred to as «concert» and in New South Wales as «Joint criminal enterprise»). The second method also deals with the activity of secondary participation, but liability is not constructed by reference to the common law classifications of principals and accessories, but by reference to the distinct doctrine of common purpose. The central issue of the doctrine of common purpose is how wide or how narrow the law will draw the common purpose in the specific factual situation.

The final chapter is doctrines of attempt. The law of attempts targets individuals who try to commit a crime but, for various reasons, do not succeed. Under the doctrines of attempt, the accused is held responsible for trying to commit a crime. The liability of the accused is extended beyond what he did, to what he or she tried to do, and even beyond what he or she caused to happen. In this sense, the crime of attempt – together with the crimes of conspiracy and of incitement – were traditionally referred to as «inchoate» crimes. «Inchoate» is Law-Latin for «incomplete». The substantive crime of attempt is an incomplete crime. The doctrine of attempts concerns itself with those elements that must be

proved in all cases where the prosecution alleges that the accused attempted to commit a crime. Section one deals with the elements of the doctrine of attempt. The basic formulation of the doctrine establishes two elements that must be proved by the prosecution when accusing a person of attempting to commit a crime. These are the accused intended to commit the complete crime, and the accused engaged in conduct that is «more than merely preparatory» and is at least «proximate» to the commission of the complete crime. These two elements constitute the *mens rea* and *actus reus* of the common law doctrine of attempt. The final section of this chapter addresses the question of impossibility. It needs to be emphasised that the question of impossibility does not give rise to any additional elements of the crime of attempt. The application of those elements to specific factual situations is what is in issue in the question of impossibility : can you attempt to commit a crime that it is impossible to commit? This question and its response are dealt with in this section.

This is a well informed and well argued book that should be welcomed as a substantial contribution to scholarship on criminal law.

This book ought to be an extremely useful resource for anyone engaged in the study of criminal law, and it would serve well as an orientation to criminal law issues for postgraduate students of law.

Today's observers of Australia and scholars of crime on that continent are awaiting this kind of publication. They are interested in understanding new information and judicial judgments to their studies. The conceptual framework and arguments in this monograph present windows of opportunity and challenges that await these readers.

The authors have been held witness to a reworking of criminal law that has not been seen perhaps since the early nineteenth century.

This book brings together written materials that embody or incorporate the current and authoritative discourse of criminal legal practices in Australia. Rush and Yeo have held up an expansive image of its teachers and students.

In summary, this is a very useful work for academic and practitioners, dealing with substantive, evidential and procedural law and focused on the substantive criminal law in Australia . Researchers and teachers can find an abundance of material that is very informative. Law enforcement will find judicial judgments and legal discussions of current trends equally fascinating and useful.

This work is a very timely and informative addition to the literature on criminal law.

Overall, this monograph is an informative, important, interactive and stimulating contribution from the perspective of the criminal law in Australia . It lays the foundations for future scholarly inquiry into unanswered questions and emerging ones.

Scholars, advocates and law students should buy this book.